STATE OF MICHIGAN

COURT OF APPEALS

MAPLEWOOD PROPERTIES, L.L.C., and 4145 PROPERTIES, L.L.C., Plaintiffs-Appellants,	UNPUBLISHED November 25, 2008
v	No. 280467 Oakland Circuit Court
LONG LAKE MARKET, INC., and FRANCIS H. PHELPS, Defendants-Appellees.	LC No. 2007-079901-CZ

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

Plaintiffs, Maplewood Properties, L.L.C. (Maplewood), and 4145 Properties, L.L.C. (4145), appeal as of right the circuit court's August 9, 2007, order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(6) and (C)(7), based on its finding that "the issues and claims set forth in the present litigation have been previously adjudicated in their entirety and must be dismissed pursuant to the doctrines of *res judicata* and collateral estoppel." On appeal, plaintiffs argue that the trial court erred by dismissing the case under res judicata and collateral estoppel because (1) in the prior matter the circuit judge failed to "reach a decision on the merits," and (2) the present case is "not identical in all material respects" because it contains "different circumstances" and additional parties that were not parties "or privy in the prior suit." We disagree, and therefore affirm the trial court's order.

I. Background

A. 2007 Litigation

Arkan Jonna, who is a member and manager of both Maplewood and 4145, stated that defendants, who own lots 7, 8, and 16 of the Devon Estates Subdivision in Bloomfield Township,[1] and their business invitees and vendors have been continuously trespassing on

[1] Defendant, Francis H. Phelps, owns lot 16, which he leases to defendant, Long Lake Market, Inc. (LLMI), which runs a retail grocery business on the lot. LLMI owns lots 7 and 8, which it uses for food preparation and storage.

plaintiffs' properties (lots 11, 12, 13, 14, 15, and 28),[2] as well as Petersen Investments, L.L.C.'s (Petersen), properties (lots 9 and 10), by driving across the properties, parking on the properties, walking across the properties, and storing trash compactors on the properties without plaintiffs' permission. As a result, plaintiffs filed a complaint on January 3, 2007, requesting that the circuit court award damages in their favor and enter a permanent injunction "enjoining defendants, and all others claiming through them, and all others who receive actual notice of the injunction, to cease and desist from [trespassing] on the Maplewood property and 4145 property." On July 31, 2007, plaintiffs filed a first amended verified complaint, which added Petersen as a plaintiff, and once again requested that the circuit court award damages in their favor and enter a permanent injunction "restraining and enjoining the defendants, and those persons with notice acting in concert with them, from trespassing on the plaintiffs' lands."[3]

B. The Prior Lawsuit

On June 30, 1999, several years prior to the present suit, LLMI and Francis H. Phelps, trustee under an agreement dated October 14, 1992, filed a complaint for declaratory relief against, in relevant part, Maplewood and Petersen,[4] seeking a declaration they have an easement, in relevant part, across the "west 20 feet" of lots 9-12, and an injunctive order preventing defendants "from interfering with the use of the easement." On September 24, 1999, Maplewood filed a counterclaim seeking damages and "a permanent injunction enjoining [LLMI and Phelps], and all others claiming through them, and all others who receive actual notice of the injunction, to cease and desist from the trespassing on Maplewood's property."

On January 25, 2002, the circuit court entered a judgment of no cause of action on LLMI and Phelps's complaint, as well as Maplewood's counterclaim, dismissing both with prejudice "for the reasons stated on the record." The court dismissed LLMI and Phelps's complaint based on his finding that LLMI and Phelps use of lots 9-15 was permissive until 1997, and thus, LLMI and Phelps could not establish a prescriptive easement. The court dismissed Maplewood's counterclaim for injunctive relief "to prevent [LLMI and Phelps's] trucks and delivery vehicles from using the alley next to Lots 12, 13, 14, and 15, and the utility easement in back of Lots 9, 10 and 11, for access to [LLMI and Phelps's] store" based on his finding that the circuit court was "not the proper venue for an endless stream of traffic and parking complaints." None of the parties affected by the January 25, 2002, order filed an appeal.

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[2] Maplewood owns lots 11-15, and has owned the lots since and prior to the 1999 litigation, which will be discussed *infra*. 4145 owns lot 28, which it acquired in March 2006.

[3] It should be noted that the circuit court did not consider plaintiffs' first amended complaint, stating that it would "not consider pleadings that are not allowed under the court rule or the Court's scheduling order."

[4] The complaint listed Katherine Marie Petersen as the owner of lots 9 and 10, as opposed to Petersen Investments, L.L.C.

C. Proceedings Below

As a result of the January 25, 2002, order, LLMI and Phelps, defendants in the instant matter, filed a motion for summary disposition, arguing that summary disposition should be granted pursuant to MCR 2.116(C)(6), (C)(7), and (C)(8) because "the entirety of [Maplewood and 4145's] claims as set forth in the instant Complaint are barred pursuant to the Doctrines of Res Judicata and Collateral Estoppel, issue and claim preclusion, in that the issues between the parties set forth in the instant suit are the identical issues and claims adjudicated with the previous litigation through to final judgment of the Court dated January 25, 2002." After hearing the parties' arguments regarding defendants' motion, the circuit court issued an opinion and order on August 9, 2007, granting defendants' motion, holding that "the prior lawsuit and the current action are identical in all material aspects and that both parties had a full and fair opportunity to litigate the issues in the prior action," and since the "prior action was decided on the merits . . . and both actions involved the same parties or their privies . . . the issues and claims set forth in the present litigation . . . must be dismissed pursuant to the doctrines of *res judicata* and collateral estoppel."

II. Analysis

The applicability of both collateral estoppel and res judicata are questions of law that we review de novo. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 555; 540 NW2d 743 (1995). We likewise review de novo a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(6)[5] or (C)(7).[6] *Davis v Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2006); *Fast Air, Inc v Knight*, 235 Mich App 541, 543; 599 NW2d 489 (1999). The applicable standard of review under MCR 2.116(C)(7) requires this Court "to accept all of plaintiffs' well-pleaded allegations as true and to construe them most favorably to plaintiffs." *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 396; 509 NW2d 829 (1993).

Res judicata applies broadly in Michigan to bar subsequent actions between the same parties concerning issues that actually were, or reasonably should have been, addressed and decided in a prior action. *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). "The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication." *Richards v Tibaldi*, 272 Mich App 522, 530; 726 NW2d 770 (2006). "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case

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[5] Summary disposition is proper under MCR 2.116(C)(6) when "[a]nother action has been initiated between the same parties involving the same claim."

[6] Summary disposition is proper under MCR 2.116(C)(7) when "[t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action."

was, or could have been, resolved in the first." *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007) (quotation and citation omitted). Dismissal of a lawsuit with prejudice is considered an adjudication on the merits for res judicata purposes. *Wilson v Knight-Ridder Newspapers Inc*, 190 Mich App 277, 279; 475 NW2d 388 (1991).

Citing MCR 2.517 and *Dauer v Zabel*, 9 Mich App 176; 156 NW2d 34 (1967), vacated 381 Mich 555 (1969), plaintiffs first argue that res judicata is not applicable because the January 25, 2002, order did not constitute a decision on the merits because the court failed to make appropriate findings of fact and conclusions of law regarding Maplewood's trespass claim. We disagree. Under MCR 2.517, a court is required to articulate either on the record or in a written opinion its findings of fact and conclusions of law. If a court fails to do so, an appellate court can remand the matter for such findings. *Dauer v Zabel*, 381 Mich 555, 558; 164 NW2d 1 (1969). As previously discussed, plaintiffs failed to appeal the January 25, 2002, order. Therefore, regardless of whether the court made the appropriate findings of fact and conclusions of law, the January 25, 2002, order is considered an adjudication on the merits. *Wilson, supra* at 278-279; see also *SS Aircraft Co v Piper Aircraft Corp*, 159 Mich App 389, 393; 406 NW2d 304 (1987) (holding that the "decision of a court having jurisdiction is final when not appealed and cannot be collaterally attacked.")

Plaintiffs next argue that res judicata is not applicable because the present matter contains different factual circumstances than the prior case, and thus, could not have been resolved in the prior case. Again, we disagree. The January 25, 2002, order concluded that the owners of lots 9-15 (Maplewood and Petersen) could not obtain an injunction to prevent a trespass against defendants based on the fact that defendants' trucks and delivery vehicles were "using the alley next to Lots 12, 13, 14, and 15, and the utility easement behind Lots 9, 10, and 11, for access to [defendants'] store."[7] In the present suit, plaintiffs filed a complaint that was nearly identical to their September 24, 1999, counterclaim, seeking damages for trespass and a permanent injunction preventing defendants, their tenants, employees, vendors, and business invitees, and the motor vehicles operated by the aforementioned parties from entering lots 9, 10, 11, 12, 13, 14, 15, and 28 "for purposes of ingress, egress and parking."

Although plaintiffs have added lot 28 to the present suit and their current claims involve a "continuous trespass," which by nature has taken place after the dismissal of Maplewood's 1999 counterclaim, given that plaintiffs would need to rely on the same facts and evidence that they needed to establish the trespass in Maplewood's prior suit (i.e., defendants, their tenants, employees, vendors, and business invitees use of lots that they do not own "for purposes of ingress, egress and parking"), res judicata is still applicable. See *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001) ("Res judicata bars relitigation of claims that are based on the same transaction or events as a prior suit"); and *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 197-198; 590 NW2d 747 (1998) (holding that two claims are identical for res

[7] Interestingly, the court noted during the January 8, 2002, arguments that "defendant's have abandoned their claim for money damages" resulting from the alleged trespass. Apparently, defendants dropped any assertion in the prior case that the trespassing was causing them economic damage.

judicata purposes if the same facts or evidence are essential to the maintenance of both claims). To hold otherwise based on the addition of one lot (that does not present any circumstances that would differentiate it from any other lot), or the presence of an alleged "continuing trespass," would, as noted by defendants, subject defendants to "a never-ending stream of litigation" despite the fact that the prior trespass action against defendants was unsuccessful.

Plaintiffs' final argument is that res judicata is not applicable because the present matter involves an additional party (4145) that was not a party "or privy in the prior suit." Once again we disagree.[8] For the purpose of res judicata, the parties to the second action only need be substantially identical to the parties in the first action, as "the rule applies to both parties and their privies." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 12; 672 NW2d 351 (2003).

> As to private parties, a privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to an agent, a master to a servant, or an indemnitor to an indemnitee. A privy includes one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession or purchase. [*Id*. at 13 (citations omitted).]

For privity to exist between a party and non-party, there must be "both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation. *Id*. (quotation and citation omitted).

Here, it is undisputed that the same single member (Jonna) owns both Maplewood and 4145. Therefore, although 4145 and Maplewood are separate legal entities, Maplewood is so "identified in interest" with 4145 that it could represent "the same legal right." Although 4145 purchased lot 28 after the first suit commenced, and therefore did not purchase a lot that was specifically addressed in the January 25, 2002, order, given that no evidence has been presented to establish that the lot has any characteristics that would differentiate it from any other lot, it follows that 4145's current interest was nonetheless presented and protected in Maplewood's prior suit. We therefore conclude that Maplewood and 4145 are in privity. *Id*. at 12-13. Accordingly, the trial court did not err when it granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(6) and (C)(7), based on its finding that plaintiffs' claims were barred by the doctrine of res judicata. *Washington, supra* at 418.

Moreover, we alternatively hold that the trial court's dismissal of plaintiffs' complaint could also be supported under the doctrine of collateral estoppel. "Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment

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[8] Even if we were to assume that Petersen was properly added as a party to this suit, given that Petersen was a party to the prior proceeding, with the January 25, 2002, order (final adjudication on the merits) addressing the alleged trespass on its property, we would have to conclude that Petersen's claim is barred by res judicata. *Washington, supra* at 418.

and the issue was actually and necessarily determined in the prior proceeding." *Ditmore, supra* at 577. Here, the court entered a valid final judgment of no cause of action regarding Maplewood's counterclaim, which it could not have done without necessarily concluding that the owners of lots 9-15 (Maplewood and Petersen) could not sustain a trespass action against defendants based on the fact that defendants' trucks and delivery vehicles were using lots 9-15 for egress and ingress to and from defendants' store. Furthermore, as previously discussed, this case involves the same parties or their privies as the prior proceeding. Thus, under the doctrine of collateral estoppel, plaintiffs would be precluded from arguing that defendants, their tenants, employees, vendors, and business invitees use of lots that they do not own (lots 9, 10, 11, 12, 13, 14, 15, and 28) "for purposes of ingress, egress and parking" constitutes a trespass. *Id*.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray